Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 703(e)	)	**CS Docket No. 97-151**
Of the Telecommunications Act	)	
Of 1996	)	
	)	
Amendments of the Commission's Rules	)	
And Policies Governing Pole Attachments	)	

To the Commission:

JOINT PETITION FOR CLARIFICATION AND/OR RECONSIDERATION OF THE EDISON ELECTRIC INSTITUTE AND UTC, THE TELECOMMUNICATIONS ASSOCIATION

David L. Swanson
Edison Electric Institute
701 Pennsylvania Avenue
Washington, D.C. 20004
(202) 508-5000

Jeffrey L. Sheldon
Sean A. Stokes
UTC
1140 Connecticut Avenue
Suite 1140
Washington, D.C. 20036
(202) 872-0030

Dated: April 13, 1998

TABLE OF CONTENTS

SUMMARY

Many of the rules adopted by the FCC to implement the new provisions of Section 224(e) governing charges for attachments to utility poles, ducts, conduits and rights-of-way, by telecommunications companies, fail to accurately apply the Act, reflect the intent of Congress, or adequately protect the valid interests of utilities, their consumers and their shareholders. Despite the undisputed Congressional preference for the use of negotiations as the principal means of establishing the terms and conditions of pole attachments, the FCC has adopted rules that place significant constraints on the negotiation process. The practical effect of the FCC's rules will be to stifle any incentive or real ability for the parties to engage in meaningful negotiations. A critical element in the successful use of negotiations is the implicit assumption that the terms and conditions that the parties negotiate in a contract are binding. The FCC must clarify the primacy of contracts.

EEI and UTC urge the Commission to reconsider its decision not to address the issue of utilizing a forward-looking economic cost pricing methodology. Forward looking pricing reflecting economic capital costs should be used as a surrogate for a market rate because it most effectively approximates the real cost of access to utility facilities

The FCC should require that in order to qualify for the "cable-only" rate a cable company should be required to certify that it is utilizing its pole attachment solely to provide cable television service, and that no other entity is using the attachment to provide services other than cable television.

EEI and UTC dispute the application of the pole attachment provisions to wireless attachments. Nevertheless, even assuming that such attachments are covered under the Act, the

FCC's application of the current "pole" attachment formula is inherently flawed. Regulated pole attachment rates are not necessary for the competitive deployment of wireless infrastructure. In addition, the fact that there are multiple suitable, and often superior, alternatives to utility infrastructure for the siting of wireless facilities that are readily available at market rates raises concerns that the FCC's application of 224 to wireless attachments is a violation of the Equal Protection clause of the Constitution. Investor-owned utilities should not be singled-out for rate regulated access to their facilities for wireless siting when all other entities, including the Federal government, are permitted to recover market rates for wireless access.

In implementing section 224(e)(2), the FCC concluded that cable companies should be counted as attaching entities for purposes of allocating the costs of non-usable space even though they are not required to pay for this space. EEI and UTC urge the FCC to reconsider this decision as it runs counter to the clear language of the statute and places an undue burden on utilities that amounts to an outright unconstitutional taking of property without just compensation. As with cable operators, ILECS should not be counted as attaching entities for purposes of allocating the non-usable space on a pole. To do otherwise is to ignore the plain meaning of the statute.

Mandatory access to utility property constitutes a "taking" of private property requiring the payment of just compensation. To allow an attaching entity to overlash its facilities without paying additional fees to the utility is to deny the utility compensation for the use of its property and would be unconstitutional under the Fifth Amendment.

EEI and UTC agree with the FCC's conclusion that Section 224(e)(2) requires a utility or its subsidiary to be counted as an attaching entity, for purposes of apportioning non-usable space, if it has attachments that are used to provide telecommunications services. However, clarification is needed that only that utility plant which is actually used for the utility's provision of

telecommunications services is to be counted for purposes of allocating the cost of unusable space.

In order to calculate the costs of non-usable space on a pole, the FCC has adopted a requirement that each utility develop, through the information it possesses, a presumptive average number of attaching entities on its poles based on location (urban, rural, urbanized). However, the FCC's decision fails to account for the fact that the US Census Bureau provides for a great deal of overlap between urban, rural and urbanized areas. Thus it will be difficult to develop these presumptions as envisioned by the FCC. In addition, the FCC provided no guidance with regard to the issue of who is expected to pay the expense of developing these presumptions.

Finally, the FCC needs to adopt all of the pole attachment-related regulations together so that the parties are given the ability to assess their rights and obligations. The interrelated nature of these issues necessitates that all of these issues be resolved concurrently otherwise it is impossible for the parties to move forward under the Act.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 703(e)	)	**CS Docket No. 97-151**
Of the Telecommunications Act	)	
Of 1996	)	
	)	
Amendments of the Commission's Rules	)	
And Policies Governing Pole Attachments	)	

To the Commission:

JOINT PETITION FOR CLARIFICATION AND/OR RECONSIDERATION OF THE EDISON ELECTRIC INSTITUTE AND UTC, THE TELECOMMUNICATIONS ASSOCIATION

Pursuant to Section 1.429 of the Commission's Rules, the Edison Electric Institute (EEI) and UTC, The Telecommunications Association,[1] hereby respectfully submit the following petition for clarification and/or reconsideration of the FCC's *Report and Order* (*R&O*), FCC 98-20, released February 6, 1998, in the above-captioned matter regarding the adoption of final rates, terms and conditions governing pole attachments after February 8, 2001.[2]

As the principal industry representatives of the utilities directly impacted by the Commission's interpretation and implementation of the Pole Attachment Act, 47 U.S.C. § 224, as amended by the Telecommunications Act of 1996, EEI and UTC were extensively involved in the underlying proceeding that resulted in the *R&O*. EEI and UTC jointly submitted comments and reply comments that focused on the need to adopt rules that: (1) exhibit a preference for

[1] UTC was formerly known as the Utilities Telecommunications Council.

negotiated agreements; (2) utilize market pricing as opposed to cost-based formulas; (3) and recognize the legitimate operational and administrative requirements of utilities. Unfortunately, and as detailed below, in many instances the FCC failed to accurately apply the Act, reflect the intent of Congress, or adequately protect the valid interests of utilities, their consumers and their shareholders.

I. The FCC's Rules Frustrate the Congressional Emphasis on Negotiations

The *R&O* was adopted pursuant to the Congressional directive in the Telecommunications Act of 1996 to implement the provisions of new Section 224(e) prescribing regulations to govern charges for attachments to utility poles, ducts, conduits and rights-of-way by telecommunications companies when the parties fail to resolve a dispute over such charges. Accordingly, the FCC's rulemaking should have been informed by the overall deregulatory thrust of the Telecommunications Act and Congressional emphasis on the use of market forces and negotiations wherever and whenever possible. However, the FCC's *R&O* has largely ignored congressional intent and instead has adopted overly bureaucratic, rigid formulaic interpretations of the pole attachment provisions.

Throughout the *R&O,* the FCC consistently adopted rules that demonstrate a marked favoritism towards attaching entities in preference to the rights and obligations of utilities as property owners. Moreover, in adopting these positions, the Commission often ascribed anti-competitive motives to utilities, adopted unsubstantiated claims by cable companies and ignored or rationalized away the legitimate concerns and rights of utilities. In a telling statement, the FCC indicated its belief that utilities "stand in a position vis-a-vis the competitive telecommunications provider seeking pole attachment agreements that is virtually

---

[2] The *R&O* was published in the Federal Register on March 12, 1998.

indistinguishable from that of the ILEC with respect to a new entrant seeking interconnection agreements."[3] Not only is this conclusion unsupported by the record, it is also highly inaccurate and unjustly prejudicial to utilities. Unlike ILECs, electric utilities are seldom direct competitors of attaching entities and therefore have little incentive to act in an anti-competitive manner towards new telecommunications entrants. If anything, utilities view new attaching entities as similar to ILECs. Historically, utilities and ILECs have been able to negotiate mutually beneficial pole attachment agreements and there is no reason to believe that new entrants would be treated any differently.[4]

While it is true that many utilities are examining strategic opportunities in some aspects of telecommunications, the vast majority do not contemplate becoming local exchange providers. Further, most utility entry into telecommunications has been in the provision of infrastructure or in partnership the those new entrants the FCC seeks to protect. Finally, it should be noted that section 224(g) and the on-going scrutiny by individual states of distribution utility activities effectively eliminate any ability of utilities to act in an anti-competitive manner, in those few instances where there is direct competition. This fact is borne out by the large number of competing facilities-based carriers, and the strict rules that states are imposing on utility affiliates.

While it is perhaps natural that the FCC would want to foster the interests of its primary constituency – cable and telephone companies – as an independent Federal agency subject to the

---

[3] *R&O*, para 21.

[4] EEI and UTC are aware that in CS Docket No. 97-98 some ILECs have suggested that they also should be given the regulated 224 rate. This request stems not from the unreasonableness of the rate that the ILECs traditionally pay utilities but because of their natural preference to obtain the far more favorable below market rate that the Act provides for attaching entities.

Administrative Procedures Act the Commission has an obligation to adopt an approach that balances the interests of all stakeholders in accordance with the law.

A. The FCC's Rules Only Pay Lip-Service To Negotiations

The plain language of Section 224(e)(1) and the accompanying Conference Committee Report evidence the clear intent of Congress that voluntary negotiations must be the fundamental means for setting the rates for telecommunications carrier attachments to utility poles, ducts, conduits and rights-of-way.[5] Yet, despite this undisputed Congressional preference for the use of negotiations as the principal means of establishing the terms and conditions of pole attachments, the FCC has adopted rules that place significant constraints on the negotiation process. While the FCC paid lip service to the use of negotiations, the practical effect of the FCC's rules will be to stifle any incentive for, or real ability of the parties to engage in meaningful negotiations.

For example, the FCC has refused to adopt any fundamental changes to the complaint procedures that it has previously adopted in the context of the old CATV pole attachment regulations. Instead, the FCC has simply attempted to recharacterize these old CATV requirements as a "negotiation process" and apply them to telecommunications attachments. This is not a mere semantic difference. Contrary to the claims of the FCC these rules have not allowed for negotiations with CATV companies but instead have resulted in government-sponsored unilateral contract modifications and have all but straight-jacketed utilities into providing uniform subsidized access to their facilities by monopoly cable companies. There is no reason to expect that these rules will result in true negotiations when applied to telecommunications attachments.

---

[5] Conference Report to the Telecommunications Act of 1996, S.652, S.Rep. 104th Congress, 2nd Sess., p.70.

One of the reasons the FCC rarely sees complaints under its current "negotiation" process is that most utilities have been bludgeoned into submission by the many constraints on actual negotiations and see no benefit in attempting to challenge presumptions.[6] If Congress had indeed been content that the current complaint process sufficiently allowed for negotiations it would not have utilized new statutory language in the amended version of the Act and would not have so strongly emphasized the role of negotiations in the Conference Report.

In adopting the current CATV complaint procedures as the standard for telecommunications attachments, the FCC rejected out-of-hand every recommendation of the utility industry with regard to modifications of the current process. Instead, the FCC concluded that the current "cable attachment" complaint procedures are adequate to establish just and reasonable rates, terms, and conditions for pole attachments. This assumes that a pole attachment is a pole attachment is a pole attachment. Even assuming that the CATV complaint procedures did work, the FCC's conclusion ignores the fundamental difference between CATV attachments and telecommunications attachments.

The telecommunications attachments that are encompassed under these new rules are far more unique than, and encompass a wide variety of attachments that go well beyond, a simple cable attachment to a suburban wood utility pole. The FCC's and parties' experience with the current complaint process is limited to cable television attachments in traditional zones on traditional distribution poles and therefore may be wholly inappropriate for governing access agreements for other equipment to other facilities such as urban facilities, unique pole configurations, ducts, conduits or rights-of-way. It is in this context that the FCC should

[6] Historically, utilities have found it virtually impossible to successfully challenge the FCC's presumptions with regard to pole attachments.

reconsider its rejection of the utility industry's proposed modifications to the current CATV complaint process for use in resolving disputes over telecommunications attachments.

Given the Commission's stated desire to have the parties negotiate pole attachment agreements, the parties must be given sufficient time to allow the negotiation process to work. While recognizing the FCC's legitimate interest in expediting competition and in the new entrant's concern over "time to market," the fact is that true negotiations take time, particularly if it is with regard to facilities or new types of attachments for which there is no standard process in place. Further, the FCC must also recognize the legitimate limitations on utility time and resources to accommodate multiple attachment requests in an expedited manner. Utilities do not and cannot construct, operate, staff or budget, on the basis of third-party usage of their physical plant. Restoration and servicing of electric utility facilities must necessarily take precedence over the interests of third-party attaching entities. Moreover, in the current environment of down-sizing and state and Federal restructuring initiatives, utilities have even fewer resources to dedicate to non-core electrical services.[7] The utility industry's legitimate constraints on responding to all attachment requests at a moment's notice further supports the need to reject unduly short periods of "attempted negotiation" in determining what constitutes good faith negotiations.[8]

[7] In many areas of the country there are entire seasons where some utilities cannot spare even a single person to work on non electric utility related projects because of storm recovery efforts in their own and in other service territories.

B. Clarification is Needed on the Degree to Which Parties Can Negotiate Differing Provisions

In comments and reply comments, EEI and UTC stressed the fact that the use of negotiations necessarily requires the allowance of some differentiation in terms and conditions depending on what the parties specifically negotiate. In the *R&O,* the FCC explicitly recognized this point, stating that all pole attachment agreements do not have to be identical. However, the FCC then qualified this statement by adding that differing provisions must not violate the statutory requirement that terms be just, reasonable, and nondiscriminatory.

EEI and UTC agree that the Act prohibits discriminatory terms. Nonetheless, clarification is necessary that the Commission did not mean to imply that utilities may not negotiate different terms and conditions in response to individual circumstances and requirements. For example, the FCC should clarify that it does not equate "good faith" negotiations with the use of a mandatory "most favored nations" clause under which a utility would not be able to vary the rates, terms and conditions that it negotiates with individual carriers.

The FCC's action on this point should be informed by the Eighth Circuit's recent decision striking down an FCC interpretation of an analogous non-discrimination provision in its *First Report and Order* in the interconnection proceeding, CC Docket No. 96-98. In *Iowa Utilities Board v. FCC,* the court held that it was not reasonable for the FCC to interpret non-discrimination as requiring "most favored nation" treatment among all parties with no variance.[9] The court held that such an interpretation conflicts with the Act's design to promote negotiated, binding agreements. Consistent with this holding, the Commission should explicitly recognize

[8] Often it is the FCC process that delays the resolution of complaints in a timely manner.

that the Section 224(f) non-discriminatory access provision not only does not require that the rates, terms and conditions of pole attachment agreements between a utility and all attaching entities be identical, but also allows for a wide range of differing but still acceptable terms, rates and conditions depending on what the parties freely negotiate in response to their unique needs.

The adoption of an overly rigid interpretation of the non-discriminatory requirement assumes the existence of standard terms and conditions which have not yet been developed, particularly for certain types of attachments such as within conduits or for wireless facilities.[10] In fact, standardization of terms is made extremely difficult by variations among utilities based upon such issues as geography, labor contracts, availability of personnel, etc. Also, uniform terms and conditions eliminate any incentive on the part of the utility to negotiate to provide anything other than a bare attachment. If unable to negotiate, utilities are unlikely to spend any effort to provide additional services or creative strategies that might enhance the new entrant's competitive positioning or quality of service. Further, the FCC failed to recognize that pole attachment agreements must necessarily embody much more than cost issues, including terms and conditions that utilities must have in order to protect their legitimate ownership rights. Utilities should have the flexibility to deny or otherwise condition access to attaching entities that repeatedly attach without agreement or notification or that have caused safety violations on multiple occasions.

C. The FCC Needs To Confirm The Primacy of Contracts

A critical element in the successful use of negotiations is the implicit assumption that the terms and conditions that the parties negotiate in a contract are binding. The parties have little

---

[9] *Iowa Utilities Board v. FCC,* 120 F.3d (8th Cir. 19971997), *cert.granted.*

[10] EEI and UTC do not concede the application of the pole attachment provisions to wireless facilities or for any attachments to transmission facilities.

incentive to reach and be bound by an agreement regarding the terms and conditions for making a pole attachment when it is known that the attaching entity can readily turn to the FCC through the complaint process to contest individual terms it has agreed to as a package in order to obtain more favorable terms. In order to eliminate this disincentive for meaningful negotiations, the FCC must clarify the primacy of contracts. Only by honoring contracts will the FCC give effect to the congressional intent that attachments be made pursuant to negotiated agreements. Specifically, the FCC should clarify that absent fraud, duress, or misrepresentation, once an agreement is mutually reached between the two entities it will be binding, and attaching parties will not have the right to use the FCC to improve or eliminate selective terms or conditions that they freely negotiated. As a condition for filing a compliant with the FCC, parties wishing to challenge certain terms or conditions of an executed contract should also be required to have taken exception to them at the time that the provisions are being negotiated, or at least by the time the agreement is signed.

D. The FCC Should Reconsider Its Rejection of The Use of Forward Looking Costs

EEI and UTC urge the Commission to reconsider its decision not to address the issue of utilizing a forward-looking economic cost pricing methodology to develop rates for instances where agreement is not reached. Under the Act the FCC was required to adopt regulations implementing the new provisions of Section 224(e) by February 8, 1998. By declining to address the use of forward-looking pricing in the *R&O* the FCC has, in effect, adopted a position rejecting their use without stating any reason whatsoever.

As was pointed out in comments and reply comments the FCC has broad latitude to establish just and reasonable rates under Section 224(e). Section 224(e) does not specify the upper or lower bounds of the rental rate for telecommunications attachments. That is one reason

why the rate is to be phased-in over five years. Accordingly, and given the Act's explicit preference for the use of market forces and negotiations as the primary means to establish attachment rates, the use of forward-looking replacement costs is reasonable and entirely appropriate in the FCC's formulation of a pricing "backstop" to be used when the parties are unable to negotiate an agreement.

Forward looking pricing reflecting economic capital costs should be used as a surrogate for a market rate because economic theory recognizes that market prices, over the long-term, will approach forward-looking, or replacement costs. Thus, the use of forward-looking costs in a regulated rate (as opposed to negotiated rate) most effectively approximates the real market cost of access to utility facilities (particularly ducts, conduits and rights-of-way). The fact that Congress specifically adopted a fully-allocated cost formula that looks to the value of the entire pole reinforces the use of forward looking pricing, as it ensures that the owner is provided full compensation for the use of its facilities. Moreover, utilities do not have a monopoly on attachment locations and the market rate applies to all non-utility property utilized by telecom providers, including government facilities.

The use of forward looking pricing would allow the presumptive rate to be at or near replacement cost. Moreover, the combination of an already competitive market, mandatory utility access and cost-apportionment, will ensure that much less than full replacement cost will be charged to an attaching entity under negotiated rates. It must be recognized that even a forward looking pricing methodology will only establish pole costs that must then be apportioned among attaching entities and in all instances under the formula a utility will be paying at least one-third of the cost of non-usable space plus its portion of the usable space. To

provide less than forward-looking pricing is an unconstitutional taking without just compensation.

Finally, as indicated by EEI and UTC in their comments, forward looking pricing has been embraced by the FCC as the proper methodology for determining the pricing of access to local telephone facilities in its interconnection proceeding, CC Docket No. 96-98, and the Commission has specifically indicated its intent to use forward looking pricing for the determination of pole and conduit costs in the universal service context.[11] It makes little sense to utilize forward-looking pricing for valuing assets owned by telephone companies that are directly competing against attaching entities and yet not apply it to utilities that are in a completely separate line of business. Moreover, it evidences a direct bias against utilities, their shareholders and their consumers for the FCC to purposely select an economic cost model in one context in order to benefit a certain group of competitors and consumers and not apply that same model where the consumers are of electricity and not telecommunications.[12] Such a bias violates the Constitution's requirement of equal protection under the law.

II. Cable Companies Should Be Required To Certify That They Are Not Offering Telecommunications Services

The FCC rejected a request by EEI and UTC that in order to qualify for the "cable-only" rate a cable company should be required to certify that it is utilizing its pole attachment solely to provide cable television service, and that no other entity is using the attachment to provide

---

[11] *Further Notice of Proposed Rulemaking*, Forward-Looking Mechanism for High Cost Support for Non-Rural LECs, CC Docket No. 96-45, released July 18, 1997, para. 104.

[12] In order for a state to "reverse preempt" the FCC under Section 224c it must certify that it regulates in the interests of the subscribers of all attaching entities as well as consumers of the utility service, and yet the FCC has adopted regulations that directly harm the interests of utility consumers.

services other than cable television. The FCC rejected the proposal on the grounds that it would "add a burden that manifests no benefit."[13]

The FCC is urged to reconsider this decision. There is no significant burden that such a certification requirement would impose on a cable operator and the record demonstrates that attaching entities often fail even to give notice of actual attachments.[14] It would simply entail a straight-forward statement as part of the pole attachment agreement that the company is using the pole attachment solely to provide cable service. On the other hand, such an agreement would manifest many benefits. Currently there is no effective means for a utility to know whether a cable operator is engaged in services other than cable television that would entitle the utility to charge the 224(e) rate.[15] A contractual certification to the utility would provide such means.

At a minimum, the FCC should clarify that while it will not compel cable certification, it would not consider a requirement of such certification an unreasonable term or condition in a pole attachment agreement. Finally, the FCC should affirm that if a utility subsequently finds that a cable company has been using its pole attachments to provide non-cable services the utility should be entitled to a recovery of all prior underpayments as well as a penalty. If it is otherwise, the cable company will not have any incentive to immediately notify the utility of any change in its status. Finally, a utility should be allowed to rely on the cable company's representations with regard to the use of its attachments in calculating the presumptive number of attaching entities on the utility's facilities.

---

[13] *R&O*, para. 35.

[14] EEI and UTC continue to assert that, under Section 224(d), cable companies offering more than cable–only service, such as data, internet access, dark fiber or third-party overlashing, are by law not entitled to the cable attachment rate.

[15] This is particularly true given the FCC's broad interpretation of the continued application of the *Heritage* decision.

III. The FCC Should Not Have Adopted Wireless Attachment Pricing Rules

As a preliminary matter it should be noted that EEI and UTC continue to dispute the application of the pole attachment provisions to wireless attachments. Nevertheless, even assuming *arguendo* that such attachments are covered under the Act, the FCC's application of the current "pole" attachment formula is inherently flawed. The Commission itself acknowledged in the *R&O* that "there are potential difficulties in applying the Commission's rules to wireless pole attachments," and that "previous and proposed rate formulas do not account for the unusual requirements of wireless attachments;" and yet, the FCC intends to apply the same pole attachment formula to wireless anyway.

There is absolutely no factual basis or any compelling policy reason for the FCC to attempt to force the square peg of wireless attachments into the round hole of the pole attachment formula. There are significant distinctions between traditional pole attachments and wireless attachments in terms of the types of equipment, types of facilities, location of attachments, and impact on utility equipment that do not easily fit into the pole attachment rate methodology. For example, while cable attachments are situated in a communications space below the electric lines, wireless attachments are usually located above the electric lines raising a host of new safety, reliability and space allocation issues. Further, wireless entities typically seek attachments on taller facilities, such as transmission towers, which petitioners have argued are outside the scope of the Act.[16] Wireless attachments also require much more associated equipment and facilities per attachment than traditional wireline pole attachments.[17] When

[16] EEI and UTC have a petition for reconsideration pending on this issue in CC Docket No. 96-98.

[17] If the FCC adheres to its decision, at a minimum, it should limit the application of the pole attachment formula to wireless attachments in traditional communications space.

attached to utility facilities they are routinely located above the electrical space and lightning arrestors and therefore have significant operational impacts.

In addition, the FCC did not provide sufficient notice in the underlying *NPRM* of its intention to address the issue of wireless attachments in this proceeding and therefore there is an inadequate record on which to develop rules. The only mention of wireless in the *NPRM* occurred in the "Initial Regulatory Flexibility Act Analysis" rather than in the substantive portions of the rulemaking. The FCC did not seek, and did not receive, any information with regard to the types of accounts that should be utilized in developing a wireless pricing formula and has provided the parties with no real guidance as to what it will consider a reasonable rate, term or condition.

Finally, the FCC's adoption of pricing rules for wireless attachments should be setaside because of the basic fact that regulated pole attachment rates are not necessary for the competitive deployment of wireless infrastructure. Unlike wireline telecommunications, wireless carriers do not need access to contiguous sites. There are multiple alternatives to utility facilities for the siting of wireless facilities that eliminate any ability of utilities to exact monopoly rents.[18] In fact, the imposition of a below-market-regulated rate for wireless attachments will only serve to distort the well established market for wireless sites. Ironically, even the Federal government leases wireless sites at market rates.[19]

If the FCC continues to find that wireless attachments are subject to § 224, EEI and UTC also ask that the Commission clarify whether it intended to preempt local zoning laws when it

---

[18] Local siting and zoning problems that wireless providers are encountering are completely unrelated to the issue of regulated rates for wireless attachments to utility facilities, and will not be alleviated by access to utility facilities.

[19] The FCC should adopt a policy that a utility rate for a wireless site is presumptively reasonable if it is comparable to the rate offered by the Federal government in the same geographic area. Presidential Executive Order "Facilitating Access to Federal Property for the Siting of Mobile Services," August 10, 1995, requires the payment of market rates for the siting of wireless facilities on Federal lands.

found that the Pole Attachments Act mandates access for wireless attachments. In many states, electric utilities are not subject to local zoning for their linear transmission and distribution facilities (*i.e.*, wires and poles). However, once any wireless equipment is placed on the transmission infrastructure, certain local governments are interpreting their zoning laws to require that electric utility infrastructure be reclassified as telecommunications towers that require special exception zoning. Therefore by mandating that utilities allow wireless attachments on their poles, the FCC has placed some utilities in the untenable position of having to comply with the FCC's rules at the expense of being found in violation of the local zoning codes.[20] Congress did not intend that implementation of the Pole Attachment Act would lead to such a result.

Therefore, the FCC should clarify that electric utilities do not become subject to local zoning laws by allowing wireless attachments to be placed on their poles in compliance with the FCC's pole attachment regulations. In the alternative, the FCC should find that electric utilities are not required to provide access for wireless attachments if, by so doing, the utility – which is not otherwise subject to local zoning – will face the threat of local zoning and code application or enforcement proceedings.

Finally, the fact that there are multiple suitable (and often superior) alternatives to utility infrastructure for the siting of wireless facilities that are readily available at market rates makes the FCC's application of 224 to wireless attachments a violation of the Equal Protection clause of the Constitution.[21] Investor-owned utilities should not be singled-out for rate regulated access to

---

[20] One company whose linear facilities are not otherwise subject to local zoning requirements is now facing code enforcement proceedings in three separate counties that claim the company is in violation of local ordinances for failure to seek special exception for a "telecommunications tower" when it increased the height and strength of an electric pole used in the transmission of electricity in order to accommodate the antenna attachment of a wireless telecommunications company.

[21] "Equal Protection" clause of the Fourteenth Amendment and the "Due Process" clause of the Fifth Amendment of

their facilities for wireless siting when all other entities, including the Federal government, are permitted to recover market rates for wireless access.

IV. Counting Attaching Entities

A. Cable Companies Should Not Be Counted As Attaching Entities Unless Providing More Than Cable-Only Service

In implementing section 224(e)(2), the FCC concluded that cable companies should be counted as attaching entities for purposes of allocating the costs of non-usable space even though they are not required to pay for this space. EEI and UTC urge the FCC to reconsider this decision as it runs counter to the clear language of the statute and places an undue burden on utilities that amounts to an outright unconstitutional taking of property without just compensation.

In explaining its decision to include cable companies in its apportionment of non-usable space, despite the fact that cable companies pay under a completely different rate, the FCC indicated its belief that 224(e)(2) does not restrict the use of the term "attaching entities" to those entities that pay rates under Section 224(e). However, a basic tenet of statutory construction is that terms are to be read in the context of the provisions in which they appear.[22] Section 224(e)(2) establishes the non-usable space component of Section 224(e)(1)'s new rate methodology for "telecommunications carriers" who use pole attachments to provide "telecommunications services," and as such, must necessarily be read in the context of Section 224(e)(1). The statutory language of 224(e)(1) is clear that the new rates under this subsection of 224 are to apply only to "telecommunications carriers." Although, in allocating the costs of the non-usable space portion of this new formula Section 224(e)(2) generically refers to these

---

the US Constitution.

[22] *See Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997).

telecommunications carriers as "entities," it makes no sense, absent additional, clear congressional guidance, to assume that in allocating non-usable space the term "entity" as used in 224(e) includes persons that are not otherwise subject to Section 224(e), and which are in fact addressed in an entirely different manner in Section 224(d).

Such an interpretation is confirmed by the fact that both Section 224(e)(2) and Section 224(e)(3) use the word "entities," and cable operators using their attachments solely to provide cable service clearly are not included in the term "entities" as used in Section 224(e)(3). Specifically, Section 224(e)(2) provides for apportioning the cost of 2/3 of the unusable space "among entities" such that the cost would be allocated to such entity under an equal apportionment of costs "among all attaching entities." Section 224(e)(3) provides for the apportioning of costs of usable space "among all entities" according to the percentage of usable space required by each. Clearly, cable operators using their attachments solely to provide cable services are not included in the term "all entities" as used in Section 224(e)(3), which is broader than the term "all attaching entities" in Section 224(e)(2), because special rates are provided for them by Section 224(d)(3). Therefore, the only logical interpretation is to conclude that the "entities" referred to in both sections are the same and do not include cable operators using their attachments solely to provide cable service. The only other choice would be to conclude – unreasonably – that Congress intended to define the term "entities" differently for Section 224(e)(2) and Section 224(e)(3).

The FCC's inclusion of cable operators within the definition of attaching entities for purposes of allocating non-usable space creates an unconstitutional taking of property. A recent Federal District Court decision confirmed that the mandatory access provisions of the Act

constitute a "taking" of utility property under the Fifth Amendment.[23] The Takings Clause of the Fifth Amendment does not prohibit the taking of private property, but instead places a condition that the property owner be provided with just compensation. The FCC's decision to count cable companies as attaching entities denies utilities their just compensation.

Under Section 224(d), utilities are not permitted to charge cable operators for the use of non-usable space, and therefore the inclusion of cable operators in the allocation of non-usable space limits the amount of recovery that can be charged to other entities for that non-usable space. In essence, the FCC's interpretation of 224(e)(2) impermissibly denies utilities the ability to actually recover an equal apportionment of two-thirds of the costs of non-usable space in any instance where there is a cable operator on a pole that is solely offering cable service. Even if the cable-only rate can be found to be permissible, that does not mean that the FCC has the authority to compound the loss to the utility by using the existence of the cable attachment to lower the rate that other attaching parties owe the utility for their confiscation of its property. It is unconstitutional and makes no sense to deny a property owner the opportunity to receive full and adequate compensation from some entities just because the law compels it to afford below-cost access to other parties. This cannot conceivably constitute the provision of just compensation under the Fifth Amendment.

B. ILECs Should Not Be Counted As Attaching Entities

As with cable operators, ILECS should not be counted as attaching entities for purposes of allocating the non-usable space on a pole. To do otherwise is to ignore the plain meaning of the statute. The new rate under Section 224(e) clearly applies to "telecommunications carriers" who use pole attachments to provide telecommunications services, and 224(a)(5) explicitly states

[23] *Gulf Power Company v. U.S.*, Case No. 3-96-cv-381/LAC (Middle Dist. of FL., February 1998).

that ILECs are not considered "telecommunications carriers" for pole attachment purposes. Given the literal terms of the Act, and the absence of any evidence of a contrary Congressional intent, it would be appropriate and reasonable for a utility to exclude ILEC attachments in determining the number of attaching entities. Such an interpretation is also bolstered by the fact that as utility pole owners themselves, ILECs are already required to pay their share of the costs of the non-usable space on their own poles.

C. Overlashing Entities Should Be Required To Pay For Their Attachments

Over the objections of pole owners the FCC concluded that attaching entities should be allowed to overlash their own facilities without obtaining a separate agreement from the pole owner and without paying additional compensation to the pole owner for the use of its property. EEI and UTC urge the FCC to reconsider this decision as the underlying record clearly established that overlashing has serious physical impacts, constitutes a separate attachment, and must necessarily be coordinated with the pole owner. Absent the grant of specific authority to overlash in the existing pole attachment agreement all parties seeking to overlash existing facilities must be required to notify the utility and enter into a new/revised pole attachment agreement, and pay any necessary make-ready costs.

As discussed above, mandatory access to utility property constitutes a "taking" of private property requiring the payment of just compensation. To allow an attaching entity to overlash its own facilities without paying additional fees to the utility is to deny the utility full compensation for the use of its property and is therefore unconstitutional under the Fifth Amendment.

If third-party overlashers are counted as attaching entities for the apportionment of the non-usable space, the FCC must clarify that such entities are required to directly pay the pole owner at least their proportionate share of the non-usable space under 224(e)(2) irrespective of

what type of service they are offering. Thus, even if the overlashing third-party is offering cable service it would be required to pay under 224(e)(2). Otherwise, in a scenario analogous to the inappropriate counting of cable companies as an attaching entity, the third-party overlasher would be counted in the allocation of the non-usable space without being required to pay its full share of this cost. Such a situation would improperly reduce the amount that the utility would be able to recover from other attaching parties and would deprive the utility of just compensation for the use of its property. The Fifth Amendment does not countenance a situation where a property owner is not only denied the right to secure any compensation from an entity using its property but also is denied the right to secure full compensation from the other entities using that same piece of property. This is particularly true if a third-party overlasher is paying a market rate to the overlashed attaching entity.

D. Utilities Should Only Be Considered Attaching Entities To The Extent That They Actually Provide Telecommunications Services

EEI and UTC agree with the FCC's conclusion that Section 224(e)(2) requires a utility or its subsidiary to be counted as an attaching entity for purposes of apportioning non-usable space, if it has attachments that are used to provide telecommunications services. However, the FCC is requested to clarify that this requirement does not apply to utility communications attachments that are not used to offer "telecommunications services" as defined in the Act.[24] For example, utility attachments for private internal communications must not be counted as part of the apportionment of the costs of the non-usable space. Such communications systems are an integral part of providing reliable and safe electricity to the public and are neither offered for a "fee" nor offered "directly to the public."

---

[24] The Act defines "Telecommunications Services" as "the offering of telecommunications for a fee directly to the public..."